



Thomas A. Schatz
President

June 9, 2017

Chairman Ajit Pai
Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

RE: Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (WC Docket No. 17-84, FCC 17-37)

Dear Chairman Pai, Commissioner Clyburn, and Commissioner O'Rielly:

On behalf of the more than one million members and supporters of Citizens Against Government Waste, I submit the attached public comments to the Federal Communications Commission (FCC) regarding the proposed Notice of Proposal Rulemaking in the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (WC Docket No. 17-84, FCC 17-37).

If you have any questions or concerns, please contact either myself or Deborah Collier at (202) 467-5300. Thank you for your consideration of our remarks.

Sincerely,

President
Citizens Against Government Waste

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C.

In the Matter of)
)
Accelerating Wireline Broadband Deployment by) WC Docket No. 17-84
Removing Barriers to Infrastructure Investment) FCC 17-37
)

Comments of
Thomas A. Schatz
President
Citizens Against Government Waste

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Citizens Against Government Waste (CAGW) is a private, nonprofit, nonpartisan organization dedicated to educating the American public about waste, mismanagement, and inefficiency in government. On behalf of the more than one million members and supporters of CAGW, I offer the following comments in respect to Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment (WC Docket No. 17-84, FCC 17-37) to aid in encouraging more rapid broadband deployment in unserved regions of the country through a streamlined and affordable process.

The administration's budget proposal for fiscal year (FY) 2018 contains an infrastructure plan to support \$1 trillion in private/public infrastructure investment, including broadband.¹ As this concept is further developed, it should include measures that will reduce regulatory barriers, particularly state and local laws and ordinances, that hinder deployment of broadband by the

¹ Budget of the U.S. Government, A New Foundation for American Greatness, Office of Management and Budget, May 23, 2017, p. 19, www.budget.gov/budget.

private sector. This is critical for regions of the country that currently have no broadband service in order to help bridge the digital divide.

Past efforts to encourage broadband expansion, such as the 2009 American Recovery and Reinvestment Act (ARRA or stimulus), focused on increasing and encouraging government intervention and intrusion into broadband deployment, with minimal benefits to the communities these efforts were intended to help. The ARRA projects often led to increased taxes and higher fees, along with wasteful spending by the federal, state, and local governments.

CAGW applauds the FCC for considering proposed rules in WC Docket No. 17-84 that seek to expand wireline infrastructure to communities across America that continue to be unserved by advanced technology. However, taxpayer funds should be used only to help provision broadband to those who truly are without such services, rather than in regions that currently have broadband internet service capabilities.

When taxpayer funds are used through either federal grants or loans, there should be increased accountability for where and how tax dollars are being spent to avoid wasteful spending and overbuild of existing infrastructure. Agency program administrators in charge of evaluating and processing federal grant requests should maintain and monitor the spending and progress of each project from start to finish through transparent databases with measurable metrics to ensure the best use of taxpayer funds.

In 2009, as required by the ARRA, the FCC developed a National Broadband Plan (NBP) to ensure that every American has “access to broadband capability” by 2020, and established

benchmarks for meeting this goal.² Unfortunately, this effort to help unserved areas of the nation turned into a wasted opportunity, as funds were used to overbuild existing networks,³ and over-purchase equipment that sat idly in warehouses.⁴ In October 2011, the FCC further expanded the definition of universal service to include broadband services, and began transitioning the Universal Service Fund (USF) program into an umbrella fund that included the Connect America Fund (CAF).⁵

The NPRM addresses several obstacles to increased broadband deployment, including the attachment of equipment to right-of-way (ROW) poles and other structures. Many localities have created a lengthy application approval process, long waiting times for poles to be prepared for new equipment to be installed, and imposed high taxes and monthly fees.

The NPRM would streamline and accelerate the Commission-established timeline for processing pole attachment requests through a one-touch-make-ready process. A new attacher could move its competitors' equipment to make room for its own equipment on a pole. This plan raises concerns about a competitor having access to view and move equipment that does not belong to them.

CAGW encourages the commission to consider the following questions in regard to one-touch-make-ready: (1) If damage to an existing provider's equipment occurs, who is liable for making restitution to the provider and their customers? (2) Since each provider is using

² "The National Broadband Plan, Executive Summary," Federal Communications Commission, March 2010, <http://www.broadband.gov/plan/>.

³ "Stimulus Money Going to Waste in Colorado?" KUSA Channel 9 News, Denver, Colorado, February 7, 2013, <http://www.9news.com/video/2149863875001/50629281001/Stimulus-money-going-to-waste-in-Colorado->.

⁴ "Waste: \$22,600 Routers," *The Charleston Gazette*, May 8, 2012, <http://www.wvgazette.com/Opinion/Editorials/201205080082>.

⁵ Sharon Gillett and Michael Byrne, Chief of the Wireline Competition Bureau and Geographic Information Officer, "Connect America Fund: Putting Consumers on the Map," Federal Communications Commission, October 12, 2011, <http://www.fcc.gov/blog/connect-america-fund-putting-consumers-map>.

different, proprietary, and often patented designs in their equipment, how will the intellectual property of each provider be protected? (3) Who is responsible for protecting the property rights of pole lessees during the process of moving equipment? and, (4) What is adequate prior notice period to existing lessees when their equipment is to be moved?

The commission should also consider what it can do, either on its own or in consultation with Congress, to ensure that broadband providers have fair and timely access to municipally-owned poles. Congress excluded such poles from Section 224 when it adopted the Pole Attachment Act in 1978 for reasons very specific to that time and place. Congress was concerned about the deployment of cable systems, which it considered to be a local issue, and presumed that the managers of such entities would be responsive to the needs of the community.⁶ However, As Chairman Pai has noted, the entities controlling access to these poles “have little interest in negotiating just and reasonable rates for private actors to access their rights of way.”⁷ In fact, some providers have reported rates for municipally-owned poles at double or even triple the rates they pay for access to other poles.

Another impediment to expansion of wireline services within communities are the additional fees and taxes imposed by federal, state, and local governments for licensing or franchise fees, or both. For many years, CAGW has pointed out the fallacy that such fees are not considered a tax, such as USF fees that communications providers pass along to consumers. Often these fees and taxes account for nearly one-third of a communications bill, and prove to be an impediment to the adoption of new services such as broadband internet by consumers.

⁶ Senate Report No. 95-580 to accompany S. 1547, as amended, Communications Act Amendments of 1978 (P.L. 95-234), 95th Cong., 1st Sess. 17-18, November 2, 1977.

⁷ Remarks of Ajit Pai, FCC Commissioner at The Brandery, Cincinnati, Ohio, “A Digital Empowerment Agenda,” Federal Communications Commission, September 13, 2016, p. 7, https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

Additional fees that are only applied to internet service providers for the sole purpose of raising revenue increase consumer costs and may result in duplicative and/or discriminatory hidden taxes.

In 2007, Eugene, Oregon began assessing a 7 percent of gross internet sales licensing fee on companies that provide broadband internet services. On May 26, 2016, the Oregon Supreme Court upheld the city's authority to attach this surcharge.⁸ This fee is in addition to the city's existing franchise fee on internet and cable service providers. In 2010, the League of Oregon Cities published a Telecommunications Toolkit, providing sample ordinances for cities to impose fees and taxes, based on the Eugene ordinance, for rights-of-way or pole attachments to generate revenue.⁹

These additional fees amount to nothing more than a tax on internet services, which is passed along to consumers.¹⁰ The Eugene fee averages \$3.15 per month per household and is directed to the city's general fund, which can be spent for any purpose deemed appropriate by the city government. Cities and towns around the state that are considering passing similar measures to increase their revenue base include La Grande, Monmouth, Talent, and Tualatin. Cities and towns that have adopted such ordinances include Creswell, Florence, Garibaldi, Gold Beach, Tigard, and Tillamook.

While municipalities are well within their rights to assess value on the rights-of-way under their jurisdiction, there are several concerns regarding these practices. First, if the user of

⁸ City of Eugene, an Oregon municipal corporation, *Respondent on Review*, v. Comcast of Oregon II, Inc., an Oregon corporation, *Petitioner on Review*, (CC 160803280; CA A147114; SC S062816), p. 528, No. 31, <http://www.publications.ojd.state.or.us/docs/S062816.pdf>.

⁹ "Telecommunications Toolkit," Sample Ordinances, League of Oregon Cities, 2010, <http://www.orcities.org/Portals/17/Premium/20101018100014414.pdf>.

¹⁰ Christian Hill, "Comcast charging customers for city fee," *The Register-Guard*, September 10, 2016, <http://projects.registerguard.com/rg/news/local/34777474-75/story.csp>.

the right-of-way is already paying a fee to the city for its use, the new tax/fee is duplicative. Second, as with the USF fee, these additional taxes and fees are passed on to consumers through higher service costs. Third, if the new tax/fee is applied only to those who provide internet service, and not to other users of the right-of-way, the ordinance is discriminatory. Even those cities that attempt to pass an ordinance that would not be discriminatory find that the ordinance can be problematic. La Grande tabled its consideration of a right-of-way licensing fee ordinance after concerns were raised about the effect it might have on other utilities, and whether the fee could be higher than the cap imposed by the FCC.¹¹

On May 23, 2017, FCC Commissioner Michael O’Rielly commented before the 2017 Wireless Infrastructure Show in Orlando, Florida that “it is also hard to argue that the excessive fees charged are fair and reasonable compensation for the use of public rights of way.”¹² While Commissioner O’Rielly was speaking about wireless right-of-way fees and pole applications, the comments apply to wireline infrastructure as well.

The myriad of laws and ordinances assessing these fees on internet service providers are potentially in conflict with the Permanent Internet Tax Freedom Act (P.L. 114-125). When an internet provider is charged additional fees to provide internet services just to line local government coffers, the fees are typically passed along to consumers and are therefore a *de facto* tax on internet access, which is prohibited by law. While local communities may wish to raise revenues for their general fund through local franchise or licensing fees in order to cover related

¹¹ Minutes, City Council Regular Session, City of La Grande, February 8, 2017, p. 2, <http://www.cityoflagrande.org/muraProjects/muraLAG/lagcity/?LinkServID=A66C23C8-0547-FCF7-154AEAC132678DD8&showMeta=0>.

¹² Remarks of Michael O’Rielly, FCC Commissioner Before the 2017 Wireless Infrastructure Show, Orlando, Florida, Federal Communications Commission, May 23, 2017, p. 5, https://apps.fcc.gov/edocs_public/attachmatch/DOC-345021A1.pdf.

operating expenses, it would be more appropriate for those localities to examine their operations to see where they can make cuts to reduce wasteful spending if they are using this income for any general government purposes.

With respect to the preemption of state and local laws relating to broadband deployment, in 2014, following an announcement by former FCC Chairman Tom Wheeler that the agency could use Section 706 of the Telecommunications Act of 1996 to preempt state laws restricting the deployment of certain broadband networks, two cities filed petitions requesting that the agency overturn their respective state laws (WCB Docket No. 14-115 and 14-116) that placed restrictions on their ability to expand government-owned networks beyond the boundaries set by the state. Section 706 specifically grants the FCC authority to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms).” That “capability” is further defined as broadband.

On March 24, 2004, the Supreme Court held in Nixon v. Missouri Municipal League (541 U.S. 125), that the Telecommunications Act of 1996 does not permit the FCC to overrule state laws regulating how municipal governments engage in telecommunications services.¹³ The Court ruled that, “The class of entities contemplated by §253 does not include the State’s own subdivisions, so as to effect the power of States and localities to restrict their own (or their political inferiors’) delivery of telecommunications services. Pp. 4-14.”¹⁴

¹³ Nixon, Attorney General of Missouri v. Missouri Municipal League et al., Supreme Court of the United States, Syllabus, October Term 2003, Certiorari to the United States Court of Appeals for the Eighth Circuit, No. 02-1238, Argued January 12, 2004, Decided March 24, 2004, p. 2, <http://transition.fcc.gov/ogc/documents/opinions/2004/02-1238-032404.pdf>.

¹⁴ Ibid.

As noted by Commissioner O’Rielly in his dissent on May 15, 2014, when the NPRM for Protecting and Promoting the Open Internet docket was approved, “...Congress never intended section 706 to be an affirmative grant of authority to the Commission to regulate the Internet. At most, it could be used to trigger *deregulation*.”¹⁵ During that same meeting, Commissioner Pai directly countered Chairman Wheeler’s proposition that the FCC should expand broadband regulation and that promoting municipal broadband is necessary in order to improve competition: “... pursuing net-neutrality regulations under section 706 or Title II places in jeopardy every other goal of this Commission in the communications marketplace ... threatening the \$60 billion a year that private companies invest in their broadband networks. ... This brave new world will deter new entrants and reduce competition in the broadband market.”¹⁶

When state laws or local ordinances hinder or restrict the potential deployment of advanced telecommunications services, preemption may very well be in order under Section 8 of the Constitution. However, CAGW urges the FCC to use restraint in exercising this authority, and to avoid using it to overturn state laws that protect municipalities from engaging in potentially costly taxpayer-funded municipal or government-owned broadband networks.

Again, thank for you for the opportunity to share these views and concerns.

¹⁵ Dissenting Statement of Commissioner Michael O’Rielly, FCC 14-61, Federal Communications Commission, May 15, 2014, <http://www.fcc.gov/article/fcc-14-61a6>.

¹⁶ Dissenting Statement of Commissioner Ajit Pai, FCC 14-61, Federal Communications Commission, May 15, 2014, <http://www.fcc.gov/article/fcc-14-61a5>.